STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2006
v JAMAL WARLICK, Defendant-Appellant.	No. 262204 Wayne Circuit Court LC No. 04-012887-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DWIGHT E. BOLDING, Defendant-Appellant.	No. 263349 Wayne Circuit Court LC No. 04-011658-01

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their jury trial convictions of felon in possession of a firearm, MCL 750.224f, discharge of a weapon inside a building, MCL 750.234b(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. In Docket No. 262204, Warlick was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 34 months to 8 years' imprisonment for the felon in possession of a firearm conviction and to 43 months to 10 years' imprisonment for the discharge of a weapon inside a building conviction. In Docket No. 263349, Bolding was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 58 months to 20 years' imprisonment for the felon in possession of a firearm conviction and to 46 months to 15 years' imprisonment for the discharge of a weapon inside a building conviction. Each defendant was also sentenced to a consecutive term of two years' imprisonment for their felony-firearm convictions.

This case arose from an altercation at a lounge that escalated into a shootout. Although the facts that formed the impetus of the original altercation are sketchy, defendant Bolding

apparently came to the aid of a woman who was assaulted on the dance floor, and defendant Warlick took that opportunity to strike Bolding. A minor melee ensued and was partially resolved by lounge security escorting Bolding out the front door. The security door locked behind Bolding, who immediately retrieved a handgun from his car and reappeared outside the front door. A woman opened the door for Bolding from inside the lounge, and he walked inside and fired several shots through the bar area and the dance floor. During a brief pause in the shooting, Barry Austin, the security guard manning the front door, managed to push Bolding back outside, where Bolding continued to fire shots. While the lounge's owner was telephoning police, Warlick pulled out a pistol and began shooting toward the door. The guard then fled through the door and hid behind a car. Still shooting, Warlick followed Austin out the door and fired several more shots at an unknown target outside. At least four individuals were wounded by the gunshots, one seriously.

Defendants argue that the trial court erred by determining that the prosecutor exercised due diligence in attempting to locate Austin before trial and compounded this error by failing to provide a missing witness jury instruction. Defendants further contend that they were denied their state and federal constitutional rights to confront Austin when the trial court admitted the transcripts of Austin's testimony from defendants' preliminary examinations. We disagree. "A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 376 (2004). Failure to demonstrate due diligence results in the trial court instructing the jury that it may infer that the witness would have provided testimony that was unfavorable to the prosecution. *Id*. "We review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *Id*. at 389. The test for due diligence "is one of reasonableness and depends upon the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

In the present case, Officer Manny Guiterrez testified that he visited Austin's last known address on Lapeer Street four times before trial. Each time, Austin was not present. During the fourth visit on March 21, 2005, the officers noticed that the house appeared "vacant" and that no one responded to their knock at the door. The officers later went to Austin's girlfriend's house, but there was no one there either. After determining that Austin was no longer living on Lapeer Street, Guiterrez inquired with the "tri-county" jails and the Michigan Department of Corrections, but there was no record of Austin. Guiterrez also used "Choice Point," a national database for law enforcement officials, but it failed to return any information regarding Austin. Guiterrez spoke with Austin's mother on March 22, 2005, the second day of trial. She informed him that Austin was in California with his stepbrother. Austin's mother did not have a phone number to reach Austin, but gave Guiterrez the stepbrother's email address. The record also reveals that Austin attended both defendants' preliminary examinations and that, following each, he was informed that he would have to return to testify at trial. In each instance, he agreed to do so. We agree with the trial court's conclusion that the prosecutor made a diligent, good-faith effort to procure Austin's live testimony at defendants' trial. *Bean*, *supra*; *Eccles*, *supra* at 388-389.

To this argument, defendants accede that the prosecutor's introduction of Austin's preliminary examination violated their rights to confrontation. We disagree. Neither defendant

raised this constitutional issue below, so we review that issue for plain error that affected their substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Testimonial statements of absent witnesses may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "Rule 804(b)(1) of the Michigan Rules of Evidence provides that, where a witness is unavailable, testimony given by the person at an earlier hearing is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination." *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). Austin was unavailable here, because he was absent and the prosecution could not procure his attendance, even with due diligence. MRE 804(a)(5). Therefore, the issue turns on each defendant's opportunity and motive to cross examine Austin.

Each defendant had an opportunity and identical motive to cross-examine Austin at their respective preliminary examinations. Cf. *People v Vera*, 153 Mich App 411, 415-416; 395 NW2d 339 (1986). Austin's testimony at each defendant's preliminary examination established that each defendant fired a handgun while inside the lounge. Each defendant thoroughly cross-examined Austin regarding his identification testimony, and this cross-examination testimony was introduced at trial. Neither defendant suggests what questions, if any, they would have asked if they had the additional opportunity. Therefore, neither defendant demonstrates how the lack of further cross-examination affected the outcome of the proceedings, and neither defendant has demonstrated either plain error or the necessary degree of prejudice.[1]

Nevertheless, Bolding argues that the trial court erred in admitting Austin's testimony from Warlick's preliminary examination, because his counsel could not cross-examine Austin at Warlick's preliminary examination. We find no plain error in the admission of Austin's testimony from each hearing. Austin's identification of Bolding was virtually identical in each defendants' preliminary examination, and Bolding clearly had an "opportunity" and a "similar motive" to cross-examine Austin at his own preliminary examination. Moreover, the trial court instructed the jury multiple times that testimony from Warlick's preliminary examination could not be used against Bolding, and a jury is presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Warlick next argues that the trial court erred in denying his motion for a separate trial. We disagree. We review for abuse of discretion a trial court's decision on a motion for separate trials. *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993). A defendant does not

[1] Both defendants correctly contend that the trial court erred in relying on the "indicia of reliability" test enunciated in *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), but they fail to demonstrate any plain error or its prejudice. *Crawford*, *supra*, was decided on March 8, 2004, 13 days before the first day of defendants' trial, and it did not change the general approach to cases in which a defendant cross-examined the absent witness at a preliminary examination. *Crawford*, *supra* at 68-69. "Where a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal." *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993). Because the trial court correctly determined that Austin's testimony from each defendants' preliminary examination was admissible, we affirm the correct result.

have an automatic right to a separate trial. *Id*. "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). However, public policy strongly favors joint trials in the interest of justice, judicial economy, and trial administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Therefore, severance should only be granted in closely related cases "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *People v Hana*, 447 Mich 325, 359-360; 524 NW2d 682 (1994), quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Hana*, *supra* at 349. "Finger pointing" alone is an insufficient reason to grant separate trials. *Id*. at 360-361.

Here, defendants' trial included similar evidence from multiple witnesses who testified about each defendant's actions on the night of the shooting, and Warlick failed to provide any facts in his pretrial motion that showed how his defense would be mutually exclusive or irreconcilable with Bolding's. Warlick only mentioned in his pretrial motion that Bolding "may" testify against him. However, the prosecutor indicated at the outset that he would not introduce any evidence from Bolding to implicate Warlick, so the jury was never going to be required to choose between either Bolding's version or Warlick's. The prosecutor would have been entitled to present the same evidence in each trial if held separately, and any potential prejudice stemming from the joint trial could be alleviated by a cautionary jury instruction. *Id*. at 351, 356, 362-363. Here, the trial court instructed the jury multiple times that the determination of guilt or innocence must be made on an individual basis, and cautioned the jury that each case had to be considered and decided separately and on the evidence that applied to each defendant. Under the circumstances, Warlick's argument fails.

Warlick next argues that there was insufficient evidence to sustain his convictions for felon in possession of a firearm, discharge of a firearm inside a building, and felony firearm. Warlick has failed to support his argument with fact or authority, so he has abandoned this specious issue on appeal. *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994).[2]

Finally, Bolding argues that he was denied his state and federal rights of confrontation by the prosecutor's comments during opening statement, that the absence of the witnesses required a missing witness instruction, and that the prosecutor engaged in misconduct. We disagree. Bolding challenges the following comment made by the prosecutor during his opening statement:

> And you may hear from some people who were in a Coney Island after that, who were in a Coney Island later that night over on Six Mile, East Six Mile, and that was the Coney Island that Mr. Dwight Bolding went to after the shooting,

[2] We note that the testimony of the lounge's owner alone provided sufficient evidence that Warlick, a distinctively dressed habitué of the lounge, fired a pistol as he ran toward the area that Bolding had just vacated.

> and Mr. Bolding was heard to say in there, "Yeah, I had to open up on a few people with my .45 tonight."

The prosecutor was apparently referring to the proposed testimony of Lenon McGee and Laurice McIntyre. However, the prosecutor was unable to produce either witness and, consequently, the jury did not hear any testimony regarding Bolding's statements to them. The trial court provided the jury with a missing witness instruction regarding the individuals. Accordingly, the record does not support Bolding's argument that the trial court failed to instruct the jury regarding the proposed witnesses' absence. Regarding Bolding's *Crawford* challenge, the prosecutor did not admit an out-of-court testimonial statement against Bolding, but merely referred to anticipated testimony. The trial court instructed the jury that the prosecutor's opening statement is not evidence and that the jury should only consider the properly admitted evidence to determine Bolding's guilt. Therefore, Bolding fails to demonstrate constitutional error. *Crawford*, *supra*.

Regarding Bolding's assertion of prosecutorial misconduct, we review the issue de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). We will not reverse for a prosecutor's unfulfilled, but good-faith, suggestion that certain evidence will be presented at trial, unless the failure to provide the evidence prejudices the defendant. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997). Here, the challenged comment was made in good faith and did not substantially prejudice Bolding. The prosecutor noted throughout the trial that he was attempting to locate and produce McGee and McIntyre, so Bolding fails to provide any support for his argument that the prosecutor never intended to call them. Furthermore, in light of the overwhelming evidence against Bolding, there is no indication that he was prejudiced by the prosecutor's comment. The brief reference to the proposed testimony during the prosecutor's opening statement was the only mention of the matter in front of the jury, and the jury was duly instructed that the opening statement was not evidence. *Graves*, *supra*. Under the circumstances, the prosecutor's actions were proper and reversal is not warranted.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood